No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, *ET AL.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *ET AL.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment includes a "one-person, one-vote" principle. This principle requires that, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). In 2013, the Texas Legislature enacted a State Senate map creating districts that, while roughly equal in terms of total population, grossly malapportioned voters. Appellants, who live in Senate districts significantly overpopulated with voters, brought a one-person, one-vote challenge, which the three-judge district court below dismissed for failure to state a claim. The district court held that Appellants' constitutional challenge is a judicially unreviewable political question.

The question presented is whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

TABLE OF CONTENTS

Pages

Questions Presented i
Table of Contents ii
Table of Authorities iii
Interest of *Amicus Curiae* 1
Statement of the Case 2
Constitutional Background 4
Factual Background 6
Summary of Argument 7
Argument 8
I. This Court's One-Person, One-Vote Reading of the Equal Protection Clause Requires Equality Based on Citizenship 8
A. Strict Scrutiny Applies to Laws that Deny Equal Protection in Voting 8
B. This Court's Prior One-Person, One-Vote Holdings Do Not Expressly Resolve the Issues Raised Here 10
C. The Reasoning of this Court's One-Person, One-Vote Decisions Compels a Citizen-Based Metric 14
II. The Proffered Reasons to Deny Relief to Citizens All Lack Merit 16
A. This Dispute Is Reviewable 16
B. The First Amendment's Right of Petition Does Not Guarantee an Equally Familiar Audience 19
C. The Analogy to Apportionment for the U.S. House of Representatives Is Inapposite 21
Conclusion 22

TABLE OF AUTHORITIES

Pages

Cases

Baker v. Carr,
369 U. S. 186 (1962) 17, 18

Bartlett v. Strickland,
556 U.S. 1 (2009) 18

Bd. of Estimate v. Morris,
489 U.S. 688 (1989) 15

Brown v. Thomson,
462 U.S. 835 (1983) 4-5

Brushaber v. Union Pac. R. Co.,
240 U.S. 1 (1916) 21

Burns v. Richardson,
384 U.S. 73 (1966) 6, 7, 10-12, 14, 21

Bush v. Vera,
517 U.S. 952 (1996) 17

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 20

Chapman v. Meier,
420 U.S. 1 (1975) 17

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) 21

Chen v. City of Houston,
532 U.S. 1046 (2001) 5

City of Boerne v. Flores,
521 U.S. 507 (1997) 19

Cooper Indus., Inc. v. Aviall Serv., Inc.,
543 U.S. 157 (2004) 13

Doe v. Braden,
57 U.S. (16 How.) 635 (1854) 18
Dunn v. Blumstein,
405 U.S. 330 (1972) 15
Evenwel v. Abbott,
135 S.Ct. 2349 (2015) 16
Evenwel v. Perry,
No. A-14-CV-335-LY-CH-MHS
(W.D. Tex. Nov. 5, 2014) 10
Flast v. Cohen,
392 U.S. 83 (1968) 13-14
Frank v. Walker,
768 F.3d 744 (7th Cir. 2014) 9
Gaffney v. Cummings,
412 U.S. 735 (1973) 10-11
Garza v. Cty. of Los Angeles,
918 F.2d 763 (9th Cir. 1990) 19
Gray v. Sanders,
372 U.S. 368 (1963) 4, 15
Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo., 397 U.S. 50 (1970) 12, 15
Harper v. Virginia State Bd. of Elections,
383 U.S. 663 (1966) 9
Kadrmas v. Dickinson Pub. Sch.,
487 U.S. 450 (1988) 9
Mahan v. Howell,
410 U.S. 315 (1973) 5
Minn. State Bd. for Cmty. Colleges v. Knight,
465 U.S. 271 (1984) 20
Mistretta v. U.S.,
488 U.S. 361 (1989) 14

Oetjen v. Central Leather Co.,
246 U.S. 297 (1918) 18

Perry v. Perez,
132 S.Ct. 934 (2012) 12

Powell v. McCormack,
395 U.S. 486 (1969) 18, 19

Reynolds v. Sims,
377 U.S. 533 (1964) 2-5, 12, 15, 21

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 16

U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) 5, 17

Univ. of Texas v. Camenisch,
451 U.S. 390 (1981) 16

Vieth v. Jubelirer,
541 U.S. 267 (2004) 17

Waters v. Churchill,
511 U.S. 661 (1994) 13

Wesberry v. Sanders,
376 U.S. 1 (1964) 9

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 9

Statutes

U.S. CONST. amend. I 7-8, 16, 19-21

U.S. CONST. amend. XIV 4, 17

U.S. CONST. amend. XIV, §1, cl. 4 ..... 2, 4, 8-11, 20-21

28 U.S.C. §1331 17

TEX. CONST. art. III, §25 (2000) 19

Rules, Regulations and Orders

S. Ct. Rule 37.6 1

Other Authorities

MERRIAM-WEBSTER ONLINE DICTIONARY (2015)..... 3

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended the Constitution's federalist structure. In the context of the integrity of the elections on which the Nation has based its political community, Eagle Forum has supported efforts both to ensure equality

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; Petitioners' and Respondents' written letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

of voters consistent with the written Constitution and validly enacted laws. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Appellants Sue Evenwel and Edward Pfenninger (collectively, "Appellants") sued the Governor and Secretary of State of Texas (collectively, "Texas") to void the recently reapportioned Texas state senate districts as violating this Court's one-person, one-vote principle under the Equal Protection Clause. In creating its new districts, Texas sought to – and did approximately – equalize those districts according to the total census population, which includes citizens and non-citizens. In doing so, however, Texas created a disparity in citizen voting strength between the predominantly rural districts with relatively few non-citizen residents and the predominantly urban districts with relatively larger populations of non-citizen residents.

When this Court's one-person, one-vote rulings began approximately fifty years ago, the effect of its holdings was to pry entrenched political power from predominantly rural districts. That power had grown inversely proportional to relative population as the cities grew from urbanization in the late 1800s and early to mid-1900s. As this Court memorably explained, "Legislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Now, due primarily to an unevenly distributed influx of non-citizens in urban areas, the disproportionately entrenched power lies predominantly in cities, which recalls that *Reynolds* ruled for *equality*, not cities:

"Legislators are elected by voters, *not farms or cities*." *Id.* (emphasis added). This case requires the Court to re-commit itself to equality.

The parties divide over the appropriate metric for voter equality: the census "population" that Texas used versus citizen voting-age population ("CVAP") favored by Appellants. There are too many alternate *populations* for the term "population" to have a precise meaning here (*e.g.*, including or excluding felons, non-residents who happen to have been present for the census, those too young to vote, etc.). Indeed, "population" is defined as "a body of persons or individuals having a *quality or characteristic* in common," MERRIAM-WEBSTER ONLINE DICTIONARY (2015) (emphasis added), which simply begs the question of what characteristics define those whom the "population" includes. However Texas chooses to permissibly resolve any *other* issues such as felons' voting rights, only one choice is relevant here: do non-citizens count? For that reason, *amicus* Eagle Forum respectfully submits that the choice presented here is between CVAP and *VAP* (*i.e.*, voting-age population, without regard to citizenship). When presented in those stark terms, the very rationale of this Court's one-person, one-vote jurisprudence compels basing voting equality on the citizens who hold that franchise.

On remand, the available data and computer models make it likely that Texas could define new senate districts that would satisfy this Court's test for voting equality (*i.e.*, up to 10% discrepancies) for both CVAP and VAP, if Texas wishes to do so. The possibility of that future prerogative of Texas cannot,

however, prevent this Court's resolving the purely legal threshold question of what metrics permissibly may apply to the equal-protection issue in the senate districts currently before this Court.

Constitutional Background

Under the Fourteenth Amendment, "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, §1, cl. 4, which – in the electoral apportionment context – this Court has held to require that each citizen voter have an approximately equal say in the outcome of elections:

> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote."

Reynolds, 377 U.S. at 558 (*quoting Gray v. Sanders*, 372 U.S. 368, 381 (1963)). This one-person, one-vote principle is the animating feature of this Court's apportionment jurisprudence since the 1960s.

Refining the principle over that interval, the Court has made clear that deviations under ten percent in the relative strength of electors' votes do not state a *prima facie* equal-protection violation. *Brown v. Thomson*, 462 U.S. 835, 842 (1983).[2] On the

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[2] The Court has allowed this deviation from ideal equality not only due to the available granularity and power of statistical and computing methods when the Court was writing its decisions but also to allow states to incorporate other legitimate other interests (*e.g.*, geographical compactness of boundaries, integrity of political subdivisions) in legislative

other hand, deviations nearing twenty percent are *per se* unconstitutional. *Mahan v. Howell*, 410 U.S. 315, 329 (1973). The more difficult disputes have involved disparities that fall between ten and twenty percent. As the precision of these percentage bounds for acceptable deviations make clear, the equal-protection rights encompass not only the denial of the right to vote but also the dilution of the franchise, *vis-à-vis* other voters:

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds, 377 U.S. at 555; *cf. U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (courts "have allowed important interests to be vindicated by plaintiffs with no more at stake ... than a fraction of a vote").

While it has thus addressed the permissible bounds of apportionment algebra with admirable – if somewhat arbitrary – precision, the Court has not defined the most basic variable in the equation: the "measure of population [that] should be used for determining whether the population is equally distributed among the districts." *Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J., dissenting from denial of *certiorari*). Because the rate of voter registration potentially might incorporate an

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districts. *See Reynolds*, 377 U.S. at 577-79; *Brown*, 462 U.S. at 842. Today's statistical and computing tools make the former concern irrelevant.

element of past discrimination or temporal anomalies, *Burns v. Richardson*, 384 U.S. 73, 95-96 & nn.25-26 (1966), the two potential metrics that present themselves are the VAP used by Texas and the CVAP proffered by Appellants. As indicated by the two acronyms – VAP and CVAP – the difference dividing the parties is whether citizenship counts.

Factual Background

Appellant Evenwel lives and votes in Texas Senate District 1, which has 573,895 citizens of voting age. Appx. 28a. Appellant Pfenninger lives and votes in Texas Senate District 4, which has 533,010 citizens of voting age. *Id.* at 30a. Using the same metric, a Texas senate district had 372,420 citizens of voting age. *Id.* at 28a, 30a. Thus, because Texas sought to equalize its senate districts on VAP, not on CVAP, the Appellants' senate districts have much more citizens of voting age than the senate district with the fewest citizens of voting age, *id.*, which equates to devaluing Appellants' votes by approximately 1:1.54 and 1:1.43, respectively, *vis-à-vis* the votes of Texas citizens in the senate district with the smallest CVAP count. *Id.* This discrepancy is entirely unsurprising, given the higher non-citizen populations in predominantly urban areas and Texas's effort to equalize voting strength on the basis of VAP.

Neither the legislative facts nor the adjudicative facts are materially in dispute: using VAP as a metric for state senate districts skews the voting strength of predominantly urban districts with high non-citizen populations to the disadvantage of rural districts with lower non-citizen populations. This

litigation is therefore an appropriate vehicle for deciding the merits of the questions presented: which population – VAP or CVAP – governs the equal-protection apportionment issues.

SUMMARY OF ARGUMENT

Because the franchise is a fundamental right that is protective of all other rights, strict scrutiny applies to this Court's evaluating Appellants' claims (Section I.A). As explained in *Burns*, this Court has reserved the question presented here between the CVAP and VAP metrics; indeed, no prior case has presented a justiciable case or controversy in which the Court *could have* even purported to resolve that issue – namely, an actionable CVAP disparity without an actionable VAP disparity – without issuing an advisory opinion (Section I.B). On the merits, while some of the Court's one-person, one-vote rulings relied on VAP, they did so only because that readily available census data was not materially different from the true measure of voter equality (namely, citizenship), which is the very essence of all of the Court's one-person, one-vote holdings (Section I.C).

In addition to Appellants' being correct on the merits of voter equality, none of the countervailing arguments have merit. First, as demonstrated by the Court's seminal voting-rights cases, this litigation does not present a non-justiciable question (Section II.A). Second, the argument that the right of petition under the First Amendment provides non-citizens a right to equal, population-based access to legislators is fanciful because – in addition to being contrary to *Burns* – the proposed right does not exist in the First

Amendment, which guarantees the right to *petition* without imposing any affirmative obligation on the legislature to listen or to respond and without undermining citizens' equal-protection rights in the voting context (Section II.B). Third, and analogously to the political-question analysis, this Court's state apportionment cases have squarely rejected the analogy to census-based apportionment in the federal Constitution, which was the result of a compromise among the sovereign states in forming this Nation and not something that the Framers intended to adopt at the state level (Section II.C).

ARGUMENT

I. THIS COURT'S ONE-PERSON, ONE-VOTE READING OF THE EQUAL PROTECTION CLAUSE REQUIRES EQUALITY BASED ON CITIZENSHIP

In safeguarding the equal-protection right to vote, the Constitution necessarily protects the right-holding class: namely, citizens. Non-citizens cannot vote, and they therefore lack an equal-protection right in this dispute. That result follows from not only the Constitution itself but also from this Court's reasoning in the one-person, one-vote decisions. In any event, the right to vote is fundamental, and states cannot abridge – that is dilute – the right to vote without a compelling need and narrow tailoring.

A. Strict Scrutiny Applies to Laws that Deny Equal Protection in Voting

Before analyzing whether Texas's apportionment laws violate the Equal Protection Clause, this Court first should analyze the constitutional scrutiny that applies here. Because voting is a fundamental right

in our democracy, *amicus* Eagle Forum respectfully submits that the Court must apply strict scrutiny.

First, "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("the right to vote is too precious, too fundamental to be so burdened or conditioned").[3] As such, "the political franchise of voting ... is regarded as a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("[o]ther rights, even the most basic, are illusory if the right to vote is undermined"); *cf. Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (deeming "equality of the franchise" a "fundamental right" that "should trigger strict scrutiny"). Appellants' equal-protection voting-rights claims therefore raise a question of the denial of their fundamental rights.

When equal-protections claims seek to defend a fundamental right (or protect against discrimination on the basis of a suspect classification), this Court reviews the challenged law under strict scrutiny. *See Kadrmas*, 487 U.S. at 458. The Texas law here

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[3] Although *Harper* is a voter-access case, and the holdings in voter-access cases do not follow the same analyses as vote-dilution cases, *see Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014) (*citing Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014) *and League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014)), the fundamental nature of the voting right transcends those two categories.

cannot survive that scrutiny because Texas easily could have created compliant senate districts on the basis of citizenship (*i.e.*, CVAP), and it could have done so while also keeping VAP under ten-percent discrepancies, if that form of non-required equality matters to Texas.

B. This Court's Prior One-Person, One-Vote Holdings Do Not Expressly Resolve the Issues Raised Here

As the district court acknowledged, this "Court has never held that a certain metric (including total population) *must* be employed as the appropriate metric." Appx. at 8a (emphasis in original). Indeed, in most cases, the Court has used total population (*i.e.*, VAP), *id.* at 7a, although the Court allowed the use of registered voters over that metric in *Burns*. By way of partial explanation, no case previously has reached this Court where the impermissibility of using a VAP metric over CVAP was both *relevant* and contested – *i.e.*, where the CVAP discrepancy was alleged or held to exceed 10% and the VAP discrepancy did not.

Deviation between CVAP and VAP is not *theoretically* new to the Court, which long ago made clear that "total population ... is ... not a talismanic measure of the weight of a person's vote," in part because "'census persons' are not voters" and the percentages of age-eligible voters vary between districts. *Gaffney v. Cummings*, 412 U.S. 735, 746-47 (1973) ("if it is the weight of a person's vote that matters, total population ... may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment,

because 'census persons' are not voters"). In *Gaffney*, however, the highest discrepancy was eight percent and thus deemed minor. *Id.* at 751. In *Burns*, the Court recognized that states *need not* count ineligible voters,[4] without having been presented with the opposite scenario of counting such ineligible-voter populations to the point of significantly debasing eligible voters' franchise:

> [T]his Court [has never] suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.

Burns, 384 U.S. at 92. As the Court explained, "[t]he decision to include or exclude any such group involves choices about the nature of representation with which *we have been shown no constitutionally founded reason to interfere.*" *Id.* (emphasis added). In all of the Court's cases to date, the Court essentially has preserved the issue, either expressly by stating so, *Burns*, 384 U.S. at 91, or impliedly by not having been presented with a case or controversy in which the difference had constitutional significance. *Id. at* 92 ("[u]nless a choice is one the Constitution forbids, the resulting apportionment base offends no

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[4] In *Burns*, this Court upheld Hawaii's use of registered voters to apportion its legislative districts to equalize citizen voting strength by omitting the military personnel and tourists who skewed the census data to Oahu. 384 U.S. at 94.

constitutional bar"); *Perry v. Perez*, 132 S.Ct. 934, 942 (2012) ("[i]n the absence of any legal flaw ... in the State's plan, the District Court had no basis to modify that plan"). *Amicus* Eagle Forum respectfully submits that only now, with an actual discrepancy of constitutional relevance between CVAP and VAP before the Court, are the issues raised here – namely, whether CVAP deviations violate the one-person, one-vote principle – before the Court.

To be sure, rationales exist in the Court's decisions that support requiring use of CVAP when the two metrics diverge: "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that *equal numbers of voters* can vote for proportionally equal numbers of officials." *Hadley*, 397 U.S. at 56 (emphasis added).[5] And the Court already has *allowed* states to ignore VAP if it would result in "a substantially distorted reflection of the distribution of *state citizenry*." *Burns*, 384 U.S. at 94. Taking this Court at its word, however, the seminal decisions "carefully left open the question what population was being referred to," even while relying predominantly on VAP as the most convenient metric. *Id.* at 91. Outside of *Burns* itself, however, this Court has not heard cases in

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[5] On the other hand, the Court's one-person, one-vote decisions also include language that, taken out of context, might support the use of *population:* "The overriding objective must be *substantial equality of population* among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *See Reynolds*, 377 U.S. at 579 (emphasis added).

which VAP differed meaningfully from CVAP. In sum, the Court has not yet affirmatively addressed the issues presented.

Because the Court has not previously addressed the CVAP-versus-VAP issue directly, the Court has not yet *decided* that issue directly: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (interior quotations omitted). Simply put, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). While *amicus* Eagle Forum respectfully submits that the rationale for the Court's various one-person, one-vote holdings supports the CVAP reading, see Section I.C, *infra*, the fact remains that the Court has not yet expressly decided the question.

Indeed, that the Court has not decided this question already should be plain from the absence of any prior case that presented the issue squarely by having an actionable CVAP disparity without an actionable VAP disparity. *Amicus* Eagle Forum respectfully submits that a majority ruling for Appellants should emphasize the lack of a prior *opportunity* for this Court even to reach his issue:

> [T]he Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a

> role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

Flast v. Cohen, 392 U.S. 83, 97 (1968); *Mistretta v. U.S.*, 488 U.S. 361, 385 (1989). If Appellants – and thus predominantly rural voters – prevail, those that lose their unfairly entrenched political power will no doubt lash out in the press against this Court's departure from its precedents. *Amicus* Eagle Forum respectfully submits that the Court's decision should make clear to anyone even nominally informed on these issues that such claims are pure sophistry. There is no controlling prior precedent on the issue because the Court has not had to confront it squarely before this case.

C. The Reasoning of this Court's One-Person, One-Vote Decisions Compels a Citizen-Based Metric

As indicated in Section I.B, *supra*, this Court in *Burns* acknowledges the use of VAP as a convenient and ready census metric in most of its one-person, one-vote decisions, but nonetheless has held open the question on the relevant metric. 384 U.S. at 91. With an actual case or controversy before it that pits CVAP against VAP, the time has finally come for this Court to resolve the issue. *Amicus* Eagle Forum respectfully submits that only CVAP fairly preserves the essential equality of voters across districts, which is the very essence of this Court's one-person, one-vote jurisprudence:

> The concept of "we the people" under the Constitution visualizes *no preferred class*

> *of voters but equality among those who meet the basic qualifications.* The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

Gray, 372 U.S. at 379-80 (emphasis added); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("a *citizen* has a constitutionally protected right to participate in elections on an *equal basis with other citizens* in the jurisdiction"); *Hadley*, 397 U.S. at 56 (quoted *supra*); *Reynolds*, 377 U.S. at 562-63 (states cannot constitutionally inflate or dilute "the votes of citizens"). Because the franchise belongs to citizens, so too does the equal-protection right.

"In calculating the deviation among districts, the relevant inquiry is whether 'the vote of any *citizen* is *approximately equal in weight to that of any other citizen.*'" *Bd. of Estimate v. Morris*, 489 U.S. 688, 701 (1989) (*quoting Reynolds*, 377 U.S. at 579) (emphasis added). This Court must reaffirm that "[w]eighting the *votes of citizens* differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." *Reynolds*, 377 U.S. at 563. Accordingly, this Court must hold that when the CVAP and VAP metrics diverge – as they do here – the one-person, one-vote principle requires reviewing courts to protect the voting rights of *citizens*, not of trees or farms, but also not of non-citizens, cities, buildings, or beltways.

II. THE PROFFERED REASONS TO DENY RELIEF TO CITIZENS ALL LACK MERIT

Given that this Court has not yet directly decided the question presented here, *amicus* Eagle Forum refutes three bases that the lower courts have used to reject using a CVAP metric in apportionment and voting rights cases. As explained in the following three sections, the issues raised here are justiciable and neither the First Amendment right of petition nor the federal Constitution's apportioning House seats on the census provides a barrier to using CVAP metrics in state apportionment cases.

A. This Dispute Is Reviewable

In the initial briefing of this case, Texas argued that this litigation presents non-justiciable political questions, which Appellants dispute. *See* Appellants' Br. at 29-37. While concurring with all of Appellants' arguments, *amicus* Eagle Forum here emphasizes that none of this Court's tests for non-justiciability apply. Moreover, although this Court has noted *probable* jurisdiction, *Evenwel v. Abbott*, 135 S.Ct. 2349 (2015) ("probable jurisdiction noted"), that is not the same thing as *actual* jurisdiction. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (likelihood of prevailing is not the same thing as prevailing). Given an appellate court's obligation first to ensure itself of its jurisdiction, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998), this Court should conclusively resolve the jurisdictional question.

The primary potential obstacle to jurisdiction is the political-question doctrine,[6] for which this Court has identified six independent criteria for non-justiciability in the voting-rights context:

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Vieth v. Jubelirer, 541 U.S. 267, 277-78 (2004) (*quoting Baker*, 369 U.S. at 217, alterations in *Vieth*). In this section, *amicus* Eagle Forum demonstrates that none of these criteria are met here.

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[6] Appellants obviously have standing, *Bush v. Vera*, 517 U.S. 952, 958 (1996) ("a plaintiff [who] resides in a [malapportioned] district ... has been denied equal treatment ... and therefore has standing"); *Chapman v. Meier*, 420 U.S. 1, 24 (1975) ("citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group"); *SCRAP*, 412 U.S. at 689 n.14 (quoted *supra*), and Appellants raise federal questions under the Fourteenth Amendment. 28 U.S.C. §1331; *Baker v. Carr*, 369 U.S. 186, 199 (1962).

First, the question whether the Constitution commits issues "to a coordinate political department" references the relationship between the federal judiciary and the *federal* legislature and executive. *See Baker*, 369 U.S. at 210-11 (non-justiciability issue "primarily [is] a function of the separation of powers," based on whether the Constitution "demonstrably commit[s] [an issue] to the [federal] executive or legislature"); *Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("political questions are not justiciable primarily because of the separation of powers *within* the Federal Government") (emphasis added). For example, courts lack the authority to second-guess foreign affairs beyond complying with the Constitution. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – "the political" – Departments of the Government"); *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1854). Nothing commits the issue of state apportionment to other branches of the federal government.

Second and third, the equal-protection basis for the Court's one-person, one-vote holdings clearly constitute "judicially discoverable and manageable standard" that rest on grounds not "clearly for nonjudicial discretion." Even if CVAP data were not readily available, those data still would remain discoverable and manageable. *Bartlett v. Strickland*, 556 U.S. 1, 32-33 (2009) (Souter, J., dissenting). This Court has inserted itself into state appropriation issues, so it can hardly withdraw now. Indeed, but for judicial intervention into state apportionment,

Texas would still apportion "Senatorial Districts ... according to the number of qualified electors." TEX. CONST. art. III, §25 (2000). Accordingly, the second and third justiciability criteria are met.

Fourth, because no "coordinate branches of the [*federal*] government" have a say on this issue, this Court cannot "express[] lack of the respect due coordinate branches of the government" in deciding this case. *Powell*, 395 U.S. at 518 (quoted *supra*). As a consequence, the fourth justiciability criterion is met as well.

Fifth and sixth, this case presents neither the "unusual need for unquestioning adherence" to prior decisions nor a risk of "multifarious pronouncements by various departments on one question." On the constitutional issues raised here, this Court is the final, exclusive arbiter. *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("[t]he power to interpret the Constitution ... remains in the Judiciary"). As such, the other governmental departments have not opined on the issues presented here, and the final two justiciability criteria are met.

B. The First Amendment's Right of Petition Does Not Guarantee an Equally Familiar Audience

The Ninth Circuit has rejected CVAP-based voting districts on the theory that districts with large non-citizen populations would be denied equal access to an elected representative in violation of the First Amendment right of petition, as compared to the access enjoyed by voting districts with fewer non-citizen residents. *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 774-75 (9th Cir. 1990). The Ninth Circuit's

concern for non-citizens is misplaced because there is no First Amendment right of *per capita* equal access.

The First Amendment provides the right to *petition* government to redress grievances. U.S. CONST. amend. I. It does not concern itself with how many other people or entities – either citizen or non-citizen – share that right *vis-à-vis* any particular government actor or entity. Although it protects the right of petition, "the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond." *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 286 (1984). Indeed, "[n]othing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Id.* at 285. Under the circumstances, the Ninth Circuit's proposed right of equal access – in the form of a proportionately familiar member of an elected body – does not exist.[7]

Quite to the contrary, the right of petition "does not necessarily give ... immunity from the [other] laws," but "may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (citations omitted). While *California Motor Transport* concerned antitrust law, its holding applies equally – even more so – to Equal Protection

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[7] As Appellants explain (Appellants' Br. at 40), the Ninth Circuit relied on cases that protect the right of petition from an unreasonable *restraint*. Nothing in Appellants' requested relief would *restrain* anyone from petitioning government anywhere.

Clause: "the Constitution does not conflict with itself by conferring, upon the one hand, [one] power, and taking the same power away, on the other, by the limitations of [another] clause." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). In other words, the right of petition cannot suppress a citizen's rights under the Equal Protection Clause and this Court's one-person, one-vote rulings.[8]

C. The Analogy to Apportionment for the U.S. House of Representatives Is Inapposite

The Fifth Circuit previously has rejected CVAP-based voting districts on the theory that allocating federal House seats on the basis of the census (which includes non-citizens) undermines the use of CVAP metrics for state elections. *Chen v. City of Houston*, 206 F.3d 502, 527 (5th Cir. 2000). As this Court's one-person, one-vote decisions have long held, however, the compromise that the sovereign states made in forming a union after winning independence from Great Britain does not render the Equal Protection Clause inapplicable to apportionment cases *within* the states.

That a court would accept such an argument is remarkable, given that "[a]ttempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements." *Reynolds*. 377 U.S. at 573. As this Court explained,

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[8] If the First Amendment requires using VAP to protect non-citizens' rights, this Court wrongly decided *Burns*, which allowed the use of registered voters over the census.

the Founders did not intend the federal apportionment compromise to establish a norm for state apportionment:

> The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population. And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted. Demonstrative of this is the fact that the Northwest Ordinance, adopted in the same year, 1787, as the Federal Constitution, provided for the apportionment of seats in territorial legislatures solely on the basis of population.

Id. In short, there is no basis for finding the "so-called federal analogy," *id.* at 572, to hold any weight here.

CONCLUSION

For the foregoing reasons and those argued by Appellants, the Court should hold that – given the disparity between VAP and CVAP in the Senate districts – Texas's allocation of voting rights based on VAP violates the equal-protection rights of citizens.

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